27850 SERVICE DATE - JANUARY 14, 1999
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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41028

COLLECTIVE DISTRIBUTION SERVICES, INC.
--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF TRANSCONTINENTAL FREIGHT SYSTEMS, INC.

Decided: January 11, 1999

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Northern District of Illinois, Eastern Division, in Transcontinental Freight Systems, Inc., v. Collective Distribution Services, Inc., Case No. 92C-8346. The court proceeding was instituted by Transcontinental Freight Systems, Inc. (TFS or respondent), a former motor common and contract carrier, to collect undercharges from Collective Distribution Services, Inc. (CDS or petitioner), a licensed property broker. TFS seeks to collect undercharges in the amount of $35,125.47, plus

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

interest and costs,[2] allegedly due, in addition to amounts previously paid, for services rendered in transporting nine shipments of various commodities, including chemicals, beverages, and glass products, between July 1, 1990, and August 9, 1991. The shipments were transported from Menlo Park, Lamirada, and Madera, CA, to points in Connecticut, Florida, Illinois, and Michigan. By order entered May 28, 1993, the court dismissed the proceeding with leave to reinstate within 30 days following a ruling by the ICC.

In response to the court order, petitioner, on June 17, 1993, filed a petition for declaratory order requesting the ICC to resolve issues of contract carriage, rate reasonableness, and tariff applicability. By decision served August 30, 1993, a procedural schedule was established for development of the record. On October 29, 1993, CDS filed its opening statement. TFS filed its reply on December 1, 1993, and petitioner filed its rebuttal on December 18, 1993.

CDS asserts that the shipments in question were handled under TFS' contract carrier authority pursuant to an agreement entered into by the parties on or before July 1, 1990. Petitioner maintains that the charges originally assessed by respondent and paid by CDS for each of the shipments were in accord with the level of rates agreed upon by the parties. CDS further asserts that it relied on the agreement in tendering its traffic to respondent and contends that the rates TFS now seeks to assess are unreasonable.

CDS supports its argument with a verified statement from its President, Jack T. Constantino. Mr. Constantino states that he is familiar with the shipments at issue and that they were all handled by TFS under contract rates in accordance with the agreement between TFS and CDS. He maintains that, in June of 1990, TFS expressed its interest in having CDS locate traffic for respondent's backhaul movements. According to Mr. Constantino, TFS was clearly advised that rate flexibility was essential to petitioner's broker operations and that CDS would use TFS only to provide service as a contract carrier because only contract carrier service allowed for the adaptable level of the rate flexibility desired by petitioner.[3] TFS provided Mr. Constantino with evidence of insurance and a copy of its contract carrier authority issued by the ICC in Docket No. MC-150617 (Sub-No. 7),[4] copies of which are attached to his statement.

Also attached to Mr. Constantino's verified statement is a summary listing of the subject shipments that sets forth the original assessed charge, the rebilled charge, the claimed balance due,

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[2] TFS originally sought $43,517.99, an amount that included an $8,392.52 claim for attorney's fees. The claim for attorney's fees was subsequently withdrawn. See reply of respondent at 3.

[3] Greater rate flexibility was available from contract carriers because contract carriers were not required to file tariffs.

[4] Mr. Constantino inadvertently referred to Docket No. MC-50617 (Sub-No. 7).

and the percentage of increase over the originally assessed charge (Exhibit C).[5] The summary listing indicates that respondent is seeking to collect charges that exceed originally assessed charges by amounts that range from 74.1% to 277.1%. Mr. Constantino states that the charges originally billed by TFS and paid by CDS reflect the competitive market rates offered by other motor carriers at the time subject shipments were transported. He asserts that CDS would never have used TFS services had that carrier quoted the rates it now seeks to assess.

In reply, TFS acknowledges that it handled the subject shipments pursuant to agreements it reached with CDS on or before July 1, 1990. However, TFS contends that the agreements were based upon the tariff rates TFS had on file with the ICC and that it handled the shipments pursuant to its common carrier authority. TFS asserts that there was no agreement to provide contract carrier service, as evidenced by CDS' failure here to produce written evidence of such an agreement,[6] and that CDS has not otherwise established that the statutory requirements for contract carriage have been met. Respondent further asserts that the tariff rates it here seeks to collect were legally filed and are reasonable.

TFS supports its position with verified statements from Alan Cordell, respondent's Controller, and paralegal Russell Okumura.[7] Mr. Cordell states that he had overall responsibility for billing and accounts receivable for TFS and that, based on his personal knowledge gained from his position, TFS' relationship with CDS was that of a common carrier. He contends that ICC Tariffs TSCF 403-C, 403-D and Tariff 100 are applicable to the subject shipments and were legally filed with the ICC. Mr. Cordell acknowledges that TFS has been unable to locate bills of lading for three of the nine shipments for which undercharges are being claimed, namely the shipments designated by invoice numbers 1017298, 1018093, and 1019087. He states, however, that TFS has provided CDS with copies of computer invoices generated from originally issued documents that establish the asserted amounts owed.[8]

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[5] The information contained in the summary listing is in conformity with the statement of account attached as Exhibit A to respondent's original court complaint, which was submitted as an exhibit in the petition for declaratory order filed by CDS.

[6] Although the existence of an agreement is acknowledged by both parties, neither was able to provide a written copy of the agreement.

[7] Mr. Okumura, a paralegal with the law firm representing respondent, submitted a statement describing the nature of the operating authorities of those carriers identified by petitioner that provided motor carrier service comparable to that provided by respondent. Given our disposition of this matter, his testimony need not be discussed further.

[8] CDS argues that the claims of TFS with respect to these three shipments have not been substantiated and should be dismissed in that respondent has failed to provide copies of freight bills or bills of lading for these shipments, citing Vertex Corporation--Petition for Declaratory Order--

(continued...)

On December 3, 1993, the NRA became law. The NRA substantially restored the ability of the ICC (and now the Board) to find that assessment of undercharges is an unreasonable practice, and it provided several new grounds on which shippers may defend against payment of undercharges. By decision served December 22, 1993, the ICC reopened the record and established a procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA and to submit new evidence and argument in light of the new law. By letter filed March 18, 1994, petitioner advised the ICC that it did not intend to file supplemental pleadings addressing NRA issues.[9]

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

At the outset, we recognize that the issues raised by the parties focus on matters of common/contract carriage and rate reasonableness and that neither party elected to address section 2(e) of the NRA. Nevertheless, our use of section 2(e)'s "unreasonable practice" provisions to resolve this matter is fully appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by the court or raised by the parties. Rather, we may instead decide cases on other grounds within our jurisdiction, and, in cases where section 2(e) provides a dispositive resolution, we rely on it rather than the more subjective contract carriage and rate reasonableness provisions. Cf. Amoco Fabrics and Fibers Co. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, No. 40526 (ICC served Feb. 26, 1992). Thus, we have jurisdiction to issue a ruling under section 2(e) of the NRA here. The Ormond Shops, Inc., Thomas J. Lipton, Inc. and Lionel Leisure, Inc. v. Oneida Motor Freight, Inc. Debtor-in-Possession, and Delta Traffic Service, Inc., No. MC-C-30156 (ICC served Apr. 20, 1994); and Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee of the Bankruptcy Estate of Total Transportation, Inc., No. 40640 (ICC served Feb. 7, 1995).

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[8](...continued)
Certain Rates and Practices of Southwest Equipment Rental, Inc., d/b/a Southwest Motor Freight, 9 I.C.C.2d 688, 693 (June 4, 1993)(Vertex). The purpose of the Vertex requirement was to enable petitioner to present information needed to understand the essential basis of respondent's undercharge claims. In view of the computer generated data and other materials provided to petitioner by respondent and the fact that petitioner was able to prepare the summary listing of the subject shipments submitted by Mr. Constantino, we are satisfied that respondent has substantially complied with the Vertex requirements.

[9] Respondent, in a letter filed April 6, 1994, advised that, based on petitioner's letter representation, it did not intend to file a supplemental pleading.

With the question of the NRA's applicability now beyond doubt, the Board has acted to use section 2(e) to more readily dispose of undercharge cases on its docket, even in those cases where, as here, the primary regulatory defense raised by the shipper against the undercharge claim has been contract carriage. E.g., Chiquita Brands, Inc.--Pet. for Decl. Order--Olympic Express, Inc., No. 41032 (STB served Oct. 22, 1996) and Southware Company et al.--Pet. for Decl. Order--Jones Truck Lines, Inc., No. 41543 (STB served Aug. 7, 1996). As illustrated by these cases, that has occurred because, in most instances, a contract establishes "written evidence" that the parties intended a negotiated, unfiled rate to supplant the filed tariff rate that a nonoperating carrier such as TFS now retroactively seeks to enforce, and for which the NRA, through section 2(e), provides a complete defense. Thus, while the petitioner relied principally on a contract carriage defense, our use of section 2(e), rather than a common/contract determination, to resolve this proceeding is fully consistent with our present approach in all of the court-referred undercharge cases on our docket.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[10]

It is undisputed that TFS no longer transports property.[11] Accordingly, we may proceed to determine whether TFS' attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a statement of account filed in respondent's original court complaint that lists the original assessed charge, the rebilled charge, the claimed balance due, and other information normally set forth in original and balance due freight bills for each of the subject shipments. The statement of account indicates that the rates originally assessed by respondent were consistently and substantially below those TFS is here seeking to assess. We find this evidence

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[10] The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation service provided prior to September 30, 1990. 49 U.S.C. 13711(g). Thus, the remedies in section 2(e) may be invoked for all of the shipments at issue in this proceeding, including the seven shipments transported after September 30, 1990.

[11] TFS ceased to conduct motor carrier operations in August of 1991.

sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997), (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

In this case, the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated rates that were originally billed by TFS and paid by CDS. Indeed, TFS readily acknowledges that it handled the subject shipments pursuant to agreements entered into by the parties. The statement of account submitted in respondent's original court filing and the acknowledgment by TFS that the shipments at issue were handled pursuant to an agreement between the parties confirm the testimony of Mr. Constantino and reflect the existence of negotiated rates.

In exercising our jurisdiction under the section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that negotiated rates were offered by TFS to CDS; that CDS, reasonably relying on the offered rates, tendered the subject traffic to TFS; that the negotiated rates were billed and collected by TFS; and that TFS now seeks to collect additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for TFS to attempt to collect undercharges from CDS for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its date of service.

3. A copy of this decision will be mailed to:

The Honorable Ann C. Williams
United States District Court,

No. 41028

Northern District of Illinois
219 South Dearborn Street
Chicago, IL 60604

Re: Case No. 92-C-8346

By the Board, Chairman Morgan, Vice Chairman Owen, and Commissioner Clyburn.

Vernon A. Williams
Secretary